IN THE

Supreme Court of the United States

October Term, 1972

No. 72-624

UNITED STATES OF AMERICA,
Petitioner,

vs.

PENNSYLVANIA INDUSTRIAL CHEMICAL CORPORATION.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit at No. 71-1840.

BRIEF FOR RESPONDENT, PENNSYLVANIA INDUSTRIAL CHEMICAL CORPORATION

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Counter-Questions Involved

1. Did the Court of Appeals correctly rule that the respondent committed no criminal violation of the Rivers and Harbors Act of 1899 if the petitioner had since 1899 and prior to the alleged offenses established no permit program for discharges of industrial waste into navigable

streams which did not affect navigation, and had affirmatively represented that no permit was required for such operations, and where the respondent had complied with state and federal water quality control standards and had obtained a state permit, which was the only available permit for its operations?

2. Where the uncontroverted evidence establishes that respondent's industrial discharge is in a liquid state and flows from sewers, has not the petitioner proved respondent's actions were within the exception to the Rivers and Harbors Act of 1899 requiring a directed verdict of acquittal?

Statutes Involved

The statutes involved are the Rivers and Harbors Act of 1899, 33 U. S. C. §§ 407, 411; Pollution Control of Navigable Waters Act of April 3, 1970, Title I, 33 U. S. C. § 1151, *et seq.* and § 1174, 84 Stat. 114; and the Act of April 3, 1970, Title II, 42 U. S. C. § 4371, 84 Stat. 114.

The Federal regulations involved are 18 C. F. R., Chapter V, part 620-10; 33 C. F. R. § 209.200 (e) (2), and 40 C. F. R. § 120.10.

Counter-Statement of the Case

The respondent (PICCO) was convicted of violating the Rivers and Harbors Act of 1899. This conviction resulted despite the fact that for over seventy years no industrial establishment in the United States could have secured a permit from the Corps of Engineers for respondent's type of discharges; despite the fact that the respondent had secured a state permit for the discharge of industrial wastes into the Monongahela River; despite the fact that the discharges alleged in the criminal information were within the

state standards for water quality control; despite the fact that the federal government itself has specifically adopted the Pennsylvania standards so that the effect is to convict respondent of discharging industrial wastes into the Monongahela River which the federal government itself agrees complies with Federal water quality control standards; and despite the fact that the Secretary of the Army, Corps of Engineers, the Environmental Protection Agency and all industrial concerns in the United States did not deem the Act applicable to the type of discharges of which respondent was convicted. The conviction resulted in part by reason of the fact that respondent's attempts to prove these matters in defense of the charges were met by objections of petitioner which were sustained by the trial court and, therefore, not submitted to the jury.

The Water Quality Control Act of 1970 was passed on April 3, 1970. The alleged violations charged in the information occurred on August 7 and 19, 1970. The Presidential Proclamation ordering the Department of the Army to promulgate a permit program under the Act of 1899 was issued December 23, 1970. The information charging the respondent with the offenses was filed on April 6, 1971. The Presidential Proclamation and the rules and regulations promulgated thereunder incorporate the Federal Water Quality Control Act into the permit implementation program. Nevertheless, the effect of the Federal Water Quality Control Act and water quality control standards were ignored by the trial court and excluded from the consideration of the jury.

The dissimilarity between the United States of 1899 and the United States of 1970 and the change from a rural to an urban society is of assistance in understanding why the President of the United States, Secretary of the Army,

Corps of Engineers, Directors of the Environmental Protection Agency, state agencies involved in water quality standards, and the industrial concerns in the United States did not believe that the Act of 1899 was meant to encompass the industrial waste discharges which complied with state standards and were within the federal standards of water quality control. When the Act of 1899 was passed, the total (1890) population of the United States was 62,947,714.[1] The rural population of the United States was 40,481,499, or 65% of the total, while the urban population was 22,106,265, or 35% of the total.[1] The manufacturing work force in the United States was 4,850,000. The total payroll of those engaged in manufacturing processes was $2,257,700,000.[2] The gross annual product for the years 1893 through 1899 was $13.5 billion in current prices.[3] The population of Allegheny County was 775,058.[4] In 1970 the population of the United States was 203,184,772. The rural population of the United States was 53,884,804, or 27% of the total, while the urban population was 149,280,769, or 73% of the total.[5] The manufacturing work force of the United States was 18,492,000 (1967 Census). The total payroll of those engaged in manufacturing processes was $123,380,600,000.00.[2] Manufacturing plants employed 26% of the entire civilian work force. The gross national product exceeded $1 trillion. The population of Allegheny County was 1,605,016, with 94.8% residing in urban areas.[5]

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[1] 1960 Census of the Population; United States Summary, Table 3 (pp. 1-4) (Exhibit 1 of this brief).

[2] 1967 Census of Manufacturers, Volume I, General Summary, Table I (p. 26) (Exhibit 2 of this brief).

[3] Historical Statistics of the United States—Colonial Times to 1957, U. S. Bureau of the Census (1960) (p. 139), Series F 1-5 (Exhibit 3 of this brief).

[4] 1969 Pennsylvania Statistical Abstract.

[5] 1970 Census of the Population; Advance Reports.

The change in population of the United States from a rural to urban industrialized society was recognized as an important factor to be considered in problems of pollution by a specific Congressional finding:

> "(1) That man has caused changes in the environment; (2) that many of these changes may effect the relationship between man and his environment; and (3) that population increases and urban concentration contribute directly to pollution and the degradation of our environment." 42 U. S. C. § 4371, Act of April 3, 1970.

Until 1971 and the implementation of the permit program at the direction of the President, no industrial establishment in the United States could have secured a permit from the Corps of Engineers for the discharge of industrial wastes into the navigable waters of this country since no such permits were available.[6] As stated, on December 23, 1970, the President of the United States issued a proclamation requiring the implementation of a permit program under the Act of 1899.[7] Regulations were issued pursuant to the Presidential proclamation in an attempt to cordinate the myriad of federal agencies concerned with environmental protection, and complex application forms were promulgated for the first time in history by the Corps of Engineers. These applications were first available in April, 1971. The applications were required to be filed by July 1, 1971.

The respondent had secured a state permit in 1956, which permit informed respondent that it was not required to make any applications or comply with any federal regulations (Exhibit 6 of this brief). The discharges alleged to

[6] Environmental Science & Technology, Vol. 5, No. 5, May, 1971, interview with William D. Ruckelshaus, p. 392 (Exhibit 4 of this brief).

[7] 35 Federal Register 19627 (Exhibit 5 of this brief).

violate the Act of 1899 were within the permitted standards of the regulations of the Commonwealth of Pennsylvania, which standards were adopted by the federal government in 1967. 18 C. F. R., Ch. V, 620.10, now 40 C. F. R. 120.10. An officer of the respondent had inquired of the Corps of Engineers whether any other permits were necessary for the operation of its plant. Respondent was informed that no other permits were required.

On June 24, 1971, the respondent went to trial on the information charging violation of the Act of 1899 and attempted to prove the above facts in an effort to exculpate itself from the criminal liability. The above facts were offered in evidence but excluded from the consideration of the jury and such facts as were alluded to by counsel for respondent in cross examination and from the few exhibits admitted in evidence were taken from the consideration of the jury by the court in its charge. With all of the facts available for the defense taken from the consideration of the jury by the court, it was not surprising that a verdict of "guilty" resulted.

The Court of Appeals reversed the conviction and held that under the facts of this case, no crime was committed. The Court of Appeals further held that if the Act of 1899 were construed to make PICCO's activities criminal, due process considerations would require the reversal.

The foregoing places the factual issues presented by the trial in a proper historical perspective in the light of the obvious dissimilarity between the United States of 1899 and the United States of 1970. With these changes in mind, the facts of the case necessary for determination are relatively few and simple.

On April 6, 1971, the United States Attorney, by information, charged the respondent in a four-count information with violations of 33 U. S. C. §§ 407 and 441. The first and second counts of the information charge that respondent did unlawfully discharge and deposit from a concrete pipe approximately two feet in diameter certain refuse matter enumerated in said counts into the Monongahela River, a navigable water of the United States, on August 7 and August 19, 1970, respectively. The third and fourth counts charged that respondent did unlawfully discharge and deposit from an iron pipe approximately 4-6 inches in diameter effluent into a small wooden settling box from the matter then was discharged into the Monongahela River, a navigable water of the United States, on August 7 and August 19, 1970, respectively.

On June 24, 1971, the day of trial, the counts were amended by deleting certain items from counts 1, 2 and 3 (Appendix, p. 5).

The court, in its preliminary instructions and in its charge to the jury, stated that the elements that government must prove beyond a reasonable doubt are:

> "One, that the Defendant discharged and deposited from its manufacturing establishment any refuse matter of any kind or description; two, that it was discharged and deposited into any navigable water or any tributary of any navigable water from which it shall float or wash into any navigable water; and, three, that the refuse matter flowing is not from streets and sewers." (Appendix pp. 8, 9; charge of court p. 208.)

It was stipulated that the Monongahela River at the sites of the discharge from respondent's plant is a navigable water of the United States and that the concrete and iron pipes alleged to be the sources of this discharge are owned by the respondent. The government had the burden of

proving the remaining two elements, namely, that the respondent unlawfully discharged any refuse matter of any kind and that the refuse matter was not flowing from streets and sewers in a liquid state.

Without recapping the testimony of each of the witnesses in detail, it is sufficient, for the purposes of this argument, to state that the discharges from PICCO's plant which were subject to the criminal information came from pipes or sewers (Appendix, pp. 31, 32, 34, 51, 55). The discharges were in a liquid state (Appendix, pp. 87, 102, 134). These facts are established by the government witnesses and confirmed by the defense witness (Appendix p. 131).

It was also testified that the discharges in question would in no way impair navigation (Appendix, p. 135). The defense expert witness in water quality control was called to define the term "refuse", but the trial court sustained objections, instructing counsel:

> ". . . but you cannot ask him whether or not it is refuse because I am going to define refuse, and any factor that has to do with that definition you can ask him about, but not the conclusion." (Appendix 129.)

The witness further testified that in his profession industrial discharge is:

> "The same as the State and Federal government defines it, which is something that is pollutional in nature. Something that contravenes or violates standards is, in fact, industrial waste." (Appendix, p. 135.)

The witness, in answer to a question if the receptacle into which the discharge is made is important in his profession to determine if it is industrial waste, answered:

> "Yes, primarily because the State and the Federal government has established water quality standards."

Objection to the answer was made and the court instructed the jury to disregard it (Appendix, p. 133).

PICCO subpoenaed Colonel E. C. West, District Director of the Corps of Engineers, which subpoena requested that he bring with him all rules and regulations relating to the provisions of § 407 of the Act, as well as other sections. John P. Dore, an employee of the Corps of Engineers, Pittsburgh District, for thirty-one years, appeared pursuant to that subpoena and an extended offer of proof was made as to this witness and the exhibits (Appendix, pp. 162-172). These exhibits, which were identified in the offer, were sealed and forwarded to the Court of Appeals for the Third Circuit.

William D. Johnson, Jr., Vice President of PICCO, testified for the defense and produced a series of documents which were offered in evidence. In addition to the exhibits which were objected to and sealed for review purposes, this witness testified that no federal permit to discharge effluent in the water into the Monongahela River existed (Appendix, p. 175), and that in the fall of 1949, when applying for a permit to build a pier, barge landing and water intake, he had a discussion with one of the associate engineers or assistant engineers in the Corps of Engineers' office in Pittsburgh and was told PICCO did not need a federal permit for its type of discharge (Appendix, p. 177). As a result of that conversation, there was no application made for a non-existent permit (Appendix, pp. 176-177).

Summary of Argument

The criminal information does not charge respondent with failure to have a permit in violation of the Act of 1899. It charges respondent did unlawfully discharge and deposit certain refuse matter into the Monongahela River. The defense attempted to introduce evidence in the trial court that the discharges were lawful discharges for the reason that they were well within the limits proscribed by Pennsylvania regulations, which had been adopted by the Federal regulations. The defense, therefore, was that the discharges were lawful and permitted by the Federal government itself. This evidence was excluded in the trial court.

The defense further attempted to show that this criminal case was not a pollution case for the reason that whether respondent was convicted or acquitted, it would still be permitted to discharge the same matters into the Monongahela River which the government had alleged were unlawful discharges. The net effect of the conviction of the respondent in this case would be absolute zero insofar as ecology or the purification of the national rivers and navigable waters are concerned.

The Court of Appeals recognized the fundamental unfairness of the petitioner's contentions in the trial court both as to whether a crime existed at all and whether, if a crime existed, due process considerations required a reversal.

The petitioner's argument that the effect of the holding of the Court of Appeals in this case in any way interferes with the government's water pollution control program is as fallacious as its argument that respondent committed a crime. The Federal Water Quality Control Act of 1972 takes the permit program out of the Act of 1899 and is an attempt to harmonize the legislation in the field of water pollution control.

It should be observed that if industry could not operate as petitioner charges without a permit from the Corps of Engineers since 1899 and no permit was available from the Secretary of the Army, the net effect is for the industry to either shut down, with attendant economic disaster, or operate in violation of the law. The Court of Appeals held this was not the result intended by Congress. It is respectfully submitted that such a conclusion is the only conclusion to be reached under the facts of this case.

ARGUMENT

I. The Court of Appeals correctly ruled that the respondent committed no criminal violation of the Rivers and Harbors Act of 1899 if the petitioner had since 1899 and prior to the alleged offenses established no permit program for discharges of industrial waste into navigable streams which did not affect navigation, and had affirmatively represented that no permit was required for such operations, and where the respondent had complied with state and federal water quality control standards and had obtained a state permit, which was the only available permit for its operations.

The instant case is the first case since 1899 which was tried on a criminal information through to a jury verdict. It is the first criminal case reaching this Honorable Court where the discharges, not affecting navigation, were not of an accidental nature but were of a continuing nature. It is the first case where the discharges were through a water treatment facility and met applicable state and federal water quality control standards.

Since this is a criminal statute invoking criminal penalties, it must be narrowly and strictly construed. As stated

in *United States v. Wiltberger*, 18 U. S. 5, Wheat. 76 (1920), at page 95:

> "The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative and not the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment."

It is also inherent in our system of justice that a fair and clear warning must be given to the public of the definition of the proscribed ambit of criminal activity. Mr. Justice Holmes, in *McBoyle v. United States*, 283 U. S. 25 (1931), dealing with a case where a defendant was charged with unlawfully stealing an airplane under a statute making it a federal crime to move a stolen vehicle, held:

> "Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible that line should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies. . . .".

The Court of Appeals, in reversing this conviction held:

> "The test to determine whether these facts, if true, would be sufficient to make out a due process violation is set forth in the leading case of Connally v. General Construction Co., 269 U. S. 385, 391 (1926):
>
> > 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it that conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law.

> And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' ". *United States v. Pennsylvania Industrial Chemical Corp.*, 461 F. 2d 468 at 477 (C. A. 3, 1972).

Mr. Justice Frankfurter, in a concurring opinion in *Malinski v. People of the State of New York*, 324 U. S. 401, 65 S. Ct. 781 (1945), stated:

> "The history of American freedom is, in no small measure, the history of procedure."

In *Olmstead v. United States*, 277 U. S. 438, 48 S. Ct. 564 (1928), Mr. Justice Brandeis, in a dissent, cautioned:

> "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."

In *United States v. Standard Oil Company*, 384 U. S. 224, 86 S. Ct. 1427 (1966), a case relied upon by petitioner, Mr. Justice Douglas stated:

> "This case comes to us at a time in the Nation's history when there is greater concern than ever over pollution—one of the main threats to our free-flowing rivers and to our lakes as well. The crisis that we face in this respect would not, of course, warrant us in manufacturing offenses where Congress has not acted nor in stretching statutory language in a criminal field to meet strange conditions. But whatever may be said of the rule of strict construction, it cannot provide a substitute for common sense, precedent, and legislative history. We cannot construe § 13 of the Rivers and Harbors Act in a vacuum."

The Court of Appeals for the Third Circuit was guided by these cited principles when it held that under the circumstances and facts of the case *sub judice* no crime was committed by PICCO. It is also the result of the application of the above-cited principles that required the Court of Appeals to find that even if the Act of 1899 were construed to make PICCO's activities criminal, due process considerations would require a reversal of the conviction.

If we are to apply common sense, precedent and legislative history to the Act of 1899 and the specific facts proved and offered to be proved in this case, it becomes crystal clear that the Rivers and Harbors Act of 1899 did not make the discharges of which PICCO was convicted a criminal offense. The dissenting opinions in the *Standard Oil Company case, supra,* and *United States v. Republic Steel Corporation,* 362 U. S. 482, 80 S. Ct. 884 (1960) have reviewed the legislative history of the Act of 1899 in support of the proposition that the Act of 1899 was not a pollution statute. The briefs of *amicus curiae* to be filed in this case also cover this aspect of the case and need not be repeated here.[8] It is sufficient to state that the *Republic Steel case* was a civil action for an injunction and clearly involves the discharge of solids into the Little Calumet River which affect navigation. The *Standard Oil Company case* passed only on the quality of the pollutant and not on the

> ". . . quantity of proof necessary to support a conviction nor on the question as to what *scienter* requirement the Act imposes, as those questions are not before us in this restricted appeal."

The quantity of proof necessary to support the instant conviction and the issue of *scienter* were specifically raised in

[8] 33 University of Pittsburgh Law Review 483 (1972). The author, Robert L. Potter, cogently argues against use of the Act of 1899 as a pollution statute.

in this case and specific exceptions were taken to the court's charge to the jury on these issues (Appendix, p. 221).

To understand the state of mind of the officers of respondent corporation, it is necessary to review what affirmative representations have been made to the public by the government of the United States and its agencies in charge of the enforcement of the Rivers and Harbors Act of 1899. The Attorney General of the United States, when considering the purpose of a direct predecessor of the 1899 Act, stated in his opinion to the Secretary of the Army:

> "You should be governed only by considerations affecting the navigation of the river and, if there be none now, then by considerations which may affect future navigation, whether it is likely to become important or not, which Congress must be presumed to have had in mind in authorizing the present and large expenditures which have been made in the improvement of the river." 21 Opp. Atty. Gen. 305, 308 (1896)

It is apposite to note that no Attorney General of the United States attempted to enforce the permit provisions of the Act of 1899 under a factual situation here present contrary to the opinion expressed by the Attorney General in 1896 until this case. In fact, an Assistant Attorney General has stated:

> "Only until early last year (1970) this statute was administered in the Department of Justice strictly as a criminal statute and it was usually applied to discharges into the navigable waters of the United States which impeded navigation." Proceedings, Rivers and Harbors Act of 1899, 30 Fed. B. J. 327, 328 (1971).

It is understandable that the Corps of Engineers would take this position since this is exactly the position taken by the government in its brief before this Honorable Court in the *Republic Steel case*. The government argued:

"The problem of pollution of streams, navigable or unnavigable, has no direct bearing on the present case, which is addressed to the obstructing of navigable capacity." Page 34 of petitioner's brief in *United States v. Republic Steel Corporation, supra.*

The Corps of Engineers had issued information circulars in 1939, a copy of which was offered in evidence but not admitted. The front page of the information circular is attached to this brief as Exhibit 7. The circular was captioned "Applications for Authority to Execute Work or Erect Structures in the Navigable Waters of the United States". Although the Corps of Engineers had been subpoenaed to bring all circulars in connection with Section 13 permits of the Act of 1899, no circular dated prior to 1971 was produced indicating permits are necessary for discharges into navigable waters which did not affect navigation. (See Exhibit 9 of this brief) It was also offered in evidence but not admitted.

In 1968, the Corps of Engineers issued a new circular entitled "Permits For Work in Navigable Waters". Excerpts from this pamphlet are attached as Exhibit 8 of this brief. This circular refers to the *Republic Steel case,* but does not indicate to the public the need for a permit to discharge industrial wastes into navigable waters which do not interfere with navigation. In a publication of the Corps of Engineers dated March 18, 1968, the following statements are, *inter alia,* made:

"1. Sections 10 and 13 of the River and Harbor Act . . . is (*sic*) designed to protect navigation and the navigable capacity of Federal navigable waters and places responsibility for enforcement upon the Department of the Army.

2. The instructions and program that follow in this paragraph deal with the problem of illegal deposits in navigable waterways under the law which explicitly concerns navigation. The Corps of Engineers has a

responsibility for pollution abatement and is carrying out that responsibility under various other media.

3. The concern of the Department of the Army in industrial waste under this program lies in the effect the suspended solids contained in the effluent from industrial outfalls have on navigable capacity of the waterway. The Department is primarily concerned under this program with the shoaling of authorized improved navigation channels and in placing the responsibility and/or cost for moving these shoals on those industries that are causing them."

In 33 C. F. R. § 209.200 (e) (2), the Corps of Engineers of the Department of the Army revised its regulations and served notice that it would consider pollution and other conservation factors in passing on applications under sections 9 and 10 of the Rivers and Harbors Act for permits for "work in navigable waters". The sole reference to Section 407 limited the Corps' consideration to problems of navigation as follows:

"(2) Section 13 of the River and Harbor Act of March 3, 1899 (30 Stat. 1152; 33 U. S. C. 407) authorizes the Secretary of the Army to permit the deposit of refuse matter in navigable waters, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, within limits to be defined and under conditions to be prescribed by him. Although the Department has exercised this authority from time to time, it is considered preferable to act under Section 4 of the River and Harbor Act of March 3, 1905 (33 Stat. 1147; 33 U. S. C. 419). As a means of assisting the Chief of Engineers in determining the effect on anchorage of vessels, the views of the U. S. Coast Guard will be solicited by coordination with the Commander of the local Coast Guard District." 33 C. F. R. § 209.200 (e) (2)

As stated, the first circular issued by the Department of the Army, Corps of Engineers referring to permits for work and structures in, and *for discharges or deposits in navigable waters* was dated 1971. (Exhibit 9 attached to this brief).

Exhibit "G", which was admitted in evidence, was a schedule of permit fees charged by the Corps of Engineers to show that the only permits referred in the schedule were for work to be done in and affecting the navigation of the waters.

It is thus evident that any citizen of the United States reading the Act of 1899 and the publications of the Executive Branch in charge of the enforcement provisions of said Act could only come to the conclusion that a permit was not required for industrial waste discharges into navigable streams if navigation was not affected thereby. Mr. Johnson, an officer of the respondent corporation, testified that this representation was made to him by an employee of the Corps of Engineers. Respondent offered to introduce in evidence a permit dated May 2, 1952 issued by the Corps of Engineers, United States Army (Appendix, p. 166); October 13, 1955 permits to replace piling and repair existing terminal structures, issued by the Corps of Engineers of the United States Army (Appendix, p. 166); July 23, 1956, letter to District Engineer from respondent for proposal to install a river water inlet suction well and strainer (Appendix, p. 167); July 5, 1957, letter of Corps of Engineers to respondent referring to extending a fence along the left bank of the Monongahela River (Appendix, p. 167); July 2, 1964, United States Army Engineers District, Pittsburgh Corps of Engineers, letter regarding installation of barge cable anchor on respondent's property on the Monongahela River approving the same (Appendix, p. 167); July 23, 1965, public notice issued by United States Army Engineer District at Pittsburgh advertising to the public for objections to the work of respondent from the standpoint of navigation (Appendix, p. 167); July 12, 1956, Commonwealth of Pennsylvania, Department of Health application to operate an industrial waste treatment plant on the premises of respondent and advertisements in newspapers in connection

therewith as required by state law (Appendix, p. 168); permit of the Commonwealth of Pennsylvania authorizing the waste treatment facilities and discharges into the navigable waters of the Monongahela River, which permit is attached to this brief as Exhibit 6. In connection with this permit it was pointed out to the court below that the Commonwealth stated that it was subject to compliance with sixteen conditions out of seventeen and that the one condition which respondent was not required to comply with was condition "16" requiring, *inter alia*, permission to be secured from proper federal authorities.

Respondent also attempted to prove, but was not permitted to by the court below, the water quality control standards of the Commonwealth of Pennsylvania and that the Pennsylvania standards had been adopted by the United States government, 18 C. F. R., Chapter V, part 620-10; 40 C. F. R. § 120.10. Respondent could have proved that the industrial waste discharges, of which respondent was convicted, are within the allowable limits of the State water quality control standards, and thus within the allowable limits of the federal standards.[9] This evidence would have thus proved, through the witness Listanti, an expert in water pollution control and the erection of waste treatment facilties, that the alleged violations were not industrial wastes or pollutants as those terms are defined in the industry and in the legislation referring to pollution control. None of these facts could be presented to the fact-finding tribunal—the jury—although the jury was charged with the responsibility of finding as a fact that respondent was discharging "refuse" and thus violating the Act of 1899. That

[9] Respondent offered to prove that it was in the process of constructing a $300,000.00 new water treatment facility to meet the new State standards, which would have become the new federal standards, by the end of 1974 but was not permitted to do so. (Appendix, pp. 123, 124)

this issue was crucial is demonstrated by the question raised by the jury after several hours of deliberation. The court charged the jury as follows:

> "The controversy in part centers around the term 'refuse'. The definition of this term is a simple one. 'Refuse matter of any kind or description whatsoever' encompasses all foreign substances and pollutants. It includes industrial waste of any kind and particularly solids. That is, particles in suspension as opposed to particles in solution. When a matter is in solution it is completely dissolved as the salt that was put in the water dissolved. If something is in suspension, the tiny particles are still there. They are not dissolved. They may even be too small to see, but they are still there. They are not dissolved into the solution.
>
> "The excepted refuse matter—in other words, the statutes, you will recall, except certain refuse matters. The excepted matter is that which flows from streets and sewers and passes therefrom in a liquid state. This means purely and simply, sewage. Sewage is matter carried away in sewers. That is, water, filth and feculent material. Generally, sewage derives from human and domestic waste. It does not include industrial waste or discharge, especially those containing suspended solids. The mere fact that something flows in water does not make it in a liquid state. You cannot pour industrial waste into water and have it carried into a navigable stream and then contend that it is excepted because it is in a liquid state. What we are talking about is that refuse which I have just defined to you, water, filth and feculent matter which generally comes from human or domestic waste . . ." (Appendix, pp. 208, 209)

After the jury deliberated several hours, they submitted the following question to the Court:

> "Please define again refuse matter." (Appendix, p. 224)

The court then compounded the error by repeating the charge above quoted in substance. Exceptions were taken to the original charge as well as the subsequent charge. On the issue of a permit, the court charged the jury:

> "I further instruct you that the testimony to the effect that the Corps of Engineers may not have had application forms for a permit and may not have issued permits because no one applied for one prior to August, 1970, is irrelevant and not for your consideration." (Appendix, p. 214)

The court also charged the jury:

> "Another thing I must charge you on is whether or not there were forms for permits, whether of not a permit was obtainable, has nothing whatsoever to do with this case. It is contrary to law to discharge these matters, as I have defined them to you, into a navigable stream without a permit, and if the Secretary of the Army in his discretion, decided not to give anybody a permit, so be it. It is not for us to decide that kind of an issue . . .". (Appendix, p. 211)

Specific exception was taken to the reference to the exercise of the discretion by the Secretary of the Army since no evidence was produced that such discretion had been exercised or that if exercised had not been exercised in accordance with the understanding of the law that no permit was required. So much for the affirmative representations of the Secretary of the Army, Corps of Engineers to the public that no permit to discharge into navigable waters was required unless it affected navigation. To now hold that such a permit was required and failure to have a permit is a criminal offense is basically an entrapment of the respondent into violating the law.

The government, in its brief, continues to make the argument that a permit was obtainable. Only the Depart-

ment of Justice attempts to engage in this charade. The Director of the Environmental Protection Agency, William D. Ruckleshaus, in an interview in May, 1971 stated:

> "It really isn't entirely fair to say that the reason a person is being sued under the Refuse Act is because they don't have a permit. They couldn't get one if they wanted to. Until the permit program of the Corps of Engineers was announced late last year, we didn't have any permit program for the discharge of waste into a stream."[10]

The President of the United States in December, 1970, after the alleged violations of which respondent was convicted, and prior to the criminal information, issued a Presidential Proclamation ordering the implementation of a permit program under the Act of 1899. 35 Federal Register, 19627. The Presidential proclamation ordered:

> "The executive branch of the Federal Government shall implement a permit program under the aforesaid section 13 of the Act of March 8, 1899 (hereinafter referred to as 'the Act') to regulate the discharge of pollutants and other refuse matter into the navigable waters of the United States or their tributaries and the placing of such matter upon their banks."

It is certainly safe to assume that the busy President of the United States would not issue a proclamation ordering the implementation of a permit program under an Act if such a permit program in fact existed prior to December 23, 1970.

Petitioner, in its brief, has attempted to place before this Court matters totally *de hors* the record, such as that a list of permits issued since 1899 for discharge of industrial wastes compiled by the Corps of Engineers in 1970 indicates only five Section 13 (407) permits. Twenty per cent

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[10] Volume 5, No. 5, May, 1971, Environmental Science and Technology, page 392.

(20%) of that list is admittedly in error since one of the permits was actually a Section 10 (403) permit. It would be interesting to see, on cross examination and scrutiny in open court, whether the other four permits were actually Section 13 permits. The petitioner also, in its appendix, has indicated news releases of the Department of the Army dated May 19, 1970 and July 30, 1970 (Government brief, pp. 41 through 46). This notwithstanding that respondent's attempts to introduce the news releases of the United States Army Engineer District in Pittsburgh dated May 7, 1971 and June 16, 1971 were objected to and not allowed in evidence at the trial. These letters and news releases are attached to this brief as Exhibits 10 and 11, and proclaim that a

> "new federal regulation goes into effect July 1 which requires all industries dumping waste material into navigable waters to obtain a permit from the U. S. Army Corps of Engineers."

The same language is repeated in various forms. In a letter of May 7, 1971, the Corps of Engineers announced that 2,000 letters of advice were issued implementing the 1899 Rivers and Harbors Act.

The Corps also forwarded application forms, which were offered in evidence to show that the application forms were voluminous and required much technological information and countered the statement of the trial judge that all one had to do was write a letter to the Secretary of the Army asking for a permit. After the first permit applications were issued, revised application forms were compiled.

While the petitioner sought a conviction of respondent for an alleged criminal offense involving "pollution", nowhere in the trial of the case was pollution defined for the jury despite the fact that, as above stated, the term has a

technological meaning and has been defined by Pennsylvania and the Federal governments.

The Pennsylvania Clean Streams Act was first enacted on June 22, 1937, and defined "pollution" as follows:

> "'Pollution' shall be construed to mean noxious and deleterious substances rendering unclean the waters of the Commonwealth to the extent of being harmful or inimical to the public health, or to animal or aquatic life, or to the use of such waters for domestic water supply, or industrial purposes, or for recreation. The Sanitary Water Board shall determine when the discharge of any industrial waste, or the effluent therefrom, constitutes pollution, as herein defined, and shall establish standards whereby and wherefrom, as far as reasonably practicable and possible, it can be ascertained and determined whether any such discharge does or does not constitute pollution as herein defined." 35 P. S. § 691.1

The Federal statute on water pollution control was first enacted in 1948. The Department of Health, Education and Welfare, in May, 1965, promulgated a model pollution law containing the following definition of "pollution":

> "'Pollution' means such contamination, or other alteration of the physical, chemical or biological properties, of any waters of the state including change in temperature, taste, color, turbidity, or odor of the waters, or such discharge of any liquid, gaseous, solid, radioactive, or other substance into any waters of the state as will or is likely to create a nuisance or render such waters harmful, detrimental or injurious to public health, safety, or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life." Vol. XLII, Pennsylvania Bar Association Quarterly, Vol. 4, page 461, citing Sax, *Water Law, Planning and Policy*, 390 (1968).

Respondent's theory in the defense of this action was to show, through its expert witnesses, that pollution has a specific definition in statutes as well as in the field of ecology and environmental control and that that definition excludes those matters which are within the standards of effluent discharge; that in order to measure an industrial discharge to determine whether it is a pollutant, it is necessary to analyze the river flow and many other factors and that if the sample discharge is within the quality control standards of the state regulations as adopted by the federal regulations, such a discharge is not a pollutant or industrial waste under the definitions of statutes and regulations. This explanation, as well as a definition of "pollution", were kept from the jury and yet the court instructed the jury as to what pollutants were and the specific facts which the jury would have to find without the jury having any idea of whether there were any standards in the United States to guide them in their fact-finding mission.

Petitioner advances a theory on why the Act of 1899 and Federal Pollution Control Acts are to be treated totally separate and apart from each other. It should be apparent that if the Act of 1899 means what petitioner argues that it means, then the voluminous statutory enactments since 1948 under the Water Pollution Control Acts are meaningless and superfluous. If, since 1899, discharges into navigable streams required a permit from the Secretary of the Army, and if the Secretary of the Army could deny such a permit and thus cause such discharges to be stopped, it follows that any less than a denial of the permit is also authorized. All the Secretary of the Army had to do since 1899 was promulgate regulations under which permits to discharge industrial wastes into navigable streams would be issued. All of the water

quality control standards subject to months of legislative hearings, hundreds of pages of testimony and legislative enactments are not needed if the Act of 1899 prohibits industrial waste discharges without a permit. That Congress has engaged in years of searching for legislation to accommodate the needs of ecology with the economy of the country and the available technology[11] compels a conclusion that the acts are *in pari materia* and should be reconciled with each other to reach a fair, logical and intelligent result. Such a result can be reached by using the Federal standards of water quality control which in this case are the same as the Commonwealth of Pennsylvania standards. It might well be argued that PICCO had a permit since the State is the certifying agency in the first instance on whether the industrial discharge should be permitted into a navigable stream. In this case, PICCO had such a permit and until the federal government preempted the field of granting permits for discharges such as those here in issue, which was not done until after December 23, 1970, the state permit should exonerate respondent from criminal charges.

The rules and regulations implementing the Presidential proclamation issued by the Corps of Engineers, Department of the Army set forth administrative procedures to secure permits for discharges or deposits into navigable waters. 36 Federal Register 90, page 6564, *et seq.* This was the first regulation ever issued by the Corps of Engineers, Department of the Army concerning such discharges. Under the regulations and statutes, Congress has recognized that the primary responsibility for water quality improvement lies with the states and at the federal

[11] For example, Mr. Johnson testified that if PICCO were required to discharge 100% pure water under the present state of technology, the plant could not operate at all. (Appendix, p.188).

level with the Environmental Protection Agency. The state is the certifying agency. The state had certified PICCO as complying with water quality control standards of the State and Federal government, but the Federal government had no permit for which the state certification would be made. The state permit until April 7, 1971, was the only permit available to PICCO. That the State was considered by Congress, even with the Act of 1899 in effect, as having the primary responsibility for the abatement of water pollution is demonstrated in 42 U. S. C. § 4371, passed April 3, 1970, which provides:

> "(b) (1) The Congress declares that there is a national policy for the environment which provides for the enhancement of environmental quality. This policy is evidenced by statutes heretofore enacted relating to the prevention, abatment, and control of environmental pollution, water and land resources, transportation, and economic and regional development.
>
> (2) The primary responsibility for implementing this policy rests with State and local governments."

There is no saving clause in this legislation similar to 33 U. S. C. § 1174.

If Congress, after all of its research and hearings into pollution problems, dating from 1948 through the amendments of the 1950's and 1960's and up to and including April 3, 1970, decided that the Act of 1899 prohibited all refuse discharges into navigable waters without a federal permit, Congress certainly would not have reiterated its intent to fix the primary responsibility for water control with the state and local governments. As late as April 3, 1970, Congress has in effect declared that industrial concerns such as PICCO who had a state permit had secured the permit from the agency designated by Congress as having the primary responsibility to abate water pollution.

As stated, the criminal information in this case was filed in April, 1971. At that time the permit program gave industry until July 1, 1971 to file for permits under the Act of 1899. It was, therefore, the policy of the petitioner to give industry a reasonable time to comply with the new-found application of a seventy-one year old statute. Such a reasonable period was required in all fairness, honesty and to meet requirements of due process.

For the foregoing reasons, the decision of the Court of Appeals that PICCO has committed no crime should be affirmed.

II. The uncontroverted evidence establishes that respondent's industrial discharge is in a liquid state and flows from sewers, so that petitioner has proved respondent's actions were within the exception of the Rivers and Harbors Act of 1899 requiring a directed verdict of acquittal.

Although the Court of Appeals for the Third Circuit reversed the conviction of respondent for the reasons set forth under the preceding argument, the Court rejected the following argument. If this case is to have any impact on the interpretation and parameters of the Rivers and Harbors Act of 1899, it is respectfully submitted that the matters raised below are raised for the first time in the factual context of this case, and, therefore, should be considered by your Honorable Court as a further reason for reversing the conviction of respondent.

The trial court defined the exception to the operation of the Act of 1899 in the language contained in *obiter dicta* in the *Standard Oil Company* and *Republic Steel cases, supra.* We again turn to the uncontroverted facts in this case. The information alleges that the discharges in

August, 1970 were from "a concrete pipe approximately 2 feet in diameter" (Counts One and Two) and from "an iron pipe approximately 4-6 inches in diameter" (Counts Three and Four) (Appendix, pp. 3, 4).

All of the witnesses testified that the discharges were from sewers and, as recited above, the discharges were in a liquid state. Although the word "sewage" is not used in the Act of 1899, the charge of the court was as follows:

> "The excepted matter is that which flows from streets and sewers and passes therefrom in a liquid state. This means purely ad simply, sewage. Sewage is matter carried away in sewers. That is, water, filth and feculent material. Generally, sewage derives from human and domestic waste. It does not include industrial waste or discharge, especially those containing suspended solids. The mere fact that something flows in water does not make it in a liquid state. You cannot pour industrial waste into water and have it carried into a navigable stream and then contend that it is excepted because it is in a liquid state. What we are talking about is that refuse which I have just defined to you, water, filth and feculent matter which generally comes from human or domestic waste." (Appendix, pp. 208, 209)

The court then compounded its error by defining "sewer" as:

> "A sewer means generally an underground conduit for fluid and feculent matter usually from houses and includes surface water, waste water and waste matter. The purpose of the sewer is to carry off such surface water, waste water and waste matter to another place for discharge."

Specific exception was taken to these definitions under the facts of this case (Appendix, p. 221). When the jury requested a definition of refuse matter, the court again charged on the exception and stated:

> ". . . what the statute makes an exception for, and that is that which flows from streets and sewers and passes therefrom in a liquid state. This is the excepted refuse matter. In other words, that could be refuse matter, but it is excepted. This simply means sewage. The exception is sewage. Sewage is matter carried away in sewers. That is water, filth and feculent matter. Generally, sewage derives from human and domestic wastes. That is an exception. Sewage can, in fluid state, be put into the waters. The exception does not include industrial wastes or discharge, especially those containing suspended solids."

The court also again incorrectly defined "sewer" and specific exceptions were taken to these definitions. (Appendix, pp. 225, 226).

It is obvious that Congress when using the words "streets and sewers" in the Act of 1899 meant those words to be defined as in the then existing dictionaries and technical publications. Webster's New International Dictionary of the English Language, based on the International Dictionary of 1890 and 1900, copyright dates 1909, 1913 and 1923, defined "sewer as:

> "Now, and artificial usually subterranean, conduit to carry off water and certain waste matter, as: (1) surface water due to rainfall; (2) household waste, as slops, waste water from sinks, baths, etc., and excreta consisting of urine and feces; (3) *waste water from industrial works.*" (Emphasis added)

All of Webster's dictionaries from that date to the present define sewers in the same way.

The Universal Dictionary of the English Language, edited by Robert Hunter and Charles Morris, published in New York by Collier, 1897, defines "sewer" as:

> "An underground channel for carrying off the surface water and liquid refuse matter of cities and towns.

Sewers are constructed of brick or earthenware pipe; iron pipes are used in few instances."

Texts on sewage and waste disposal were published before and in the general area of 1899. The following are excerpts from such texts on the subject:

A Discussion of the Prevailing Theories and Practices Relating to Sewage Disposal, by Wynkoop Kiersted; New York, 1894, page 7:

"Sewage is a complex mixture with water of the *various waste products of life and industry* from densely settled communities, of which the solids are properly restricted to those that are susceptible either of solution in water or of becoming speedly disintegrated while in a state of transit. . .Its chemical composition and degree of dilution varies with the character of industrial pursuits, with the amount of mineral matter naturally dissolved in a water supply, and with the volume and rate of water consumption." (Emphasis added)

Sewerage, by A. Prescott Folwell; New York, 1898, page 15:

"For a proper consideration of the various methods of disposal, it will be necessary to understand the results aimed at and the principles involved. And first we must understand what is implied by the word sewage. In the dry sewage and pneumatic systems it means human excreta and nothing else. In the water-carriage system, however, sewage may be found to contain almost every description of waste matter: feces, house-'slops', *manufacturing waste waters and acids,* drainage of stables, piggeries, and slaughter houses, waste paper and rags, and frequently 'swill', and numberless matters which should never reach the sewer. This is ordinarily called house-sewage. Into combined and storm sewers, besides rain water, not only horse droppings and vegetable refuse, but sand, clay, gravel, and other heavy matters find admission to the street inlets. These go to make what is called storm-sewage." (Emphasis added)

Sewerage and Sewage Purification, by M. N. Baker; New York, 1896, pages 7-8:

"To make the distinction between sewers and drains more complete, it may be said that sewers carry water fouled with organic wastes from the human system, from various cleansing processes common to all householders, *and also manufacturing wastes;* all drains convey rain or underground water only." (Emphasis added)

The Act of 1899, if analyzed from a grammatical standpoint, compels the conclusion that PICCO's industrial waste discharges coming from sewers is excepted from the operation of the Act. The statute makes unlawful the discharge of any refuse matter of any kind or description whatever other "than *that* flowing from streets and sewers and passing therefrom in a liquid state into any navigable waters of the United States". (Emphasis added) If PICCO's industrial waste discharges are refuse matter within the meaning of the Act of 1899, it should be obvious that the exception in the same Act which applies to refuse matter "other that *that*" refers to the same refuse matter which is prohibited from being discharged into navigable waters. The Act does not state that refuse matter is prohibited except for water, filth and feculent material derived from human and domestic waste which flows in streets and sewers. The refuse matter of any kind which may not be discharged into any navigable waters of the United States is excepted if the same refuse matter of any kind is floating from streets and sewers in a liquid state. The uncontradicted testimony is that the discharges from respondent's plant flow from sewers in a liquid state. As such, it is excepted from the terms of the criminal statute itself. To do otherwise is to by judicial definition legislate out of the Act the exception contained in the Act.

Conclusion

The Court of Appeals for the Third Circuit, reviewing all of the facts of this case, including the offers of proof and exhibits which were excluded by the rulings of the trial court, concluded that Congress could not have intended to create a crime with the attendant criminal penalties for failure to comply with a non-existent regulatory program. For this reason the Court of Appeals held that under the circumstances of this case no crime was committed. The Court of Appeals further held that even if the Act of 1899 were construed to make respondent's activities criminal, due process considerations would require a reversal of the conviction. The Court of Appeals also held that it was not unreasonable for respondent to read Section 407 as permitting the discharge of wastes not affecting navigation in the same way the Corps of Engineers and the Department of Justice circularized and represented the same criminal statute.

This prosecution and the sentencing of respondent to the maximum fine for violating a non-existent permit program runs contrary to the history and to the philosophy of American justice which is in no small measure a history of proper procedure. This prosecution is an insidious encroachment on the traditional concepts of criminal law by men of zeal who are operating without understanding. For seventy-one years industries operating in the same fashion as respondent were not advised of the tortured interpretation of a criminal statute that would bring their operation within the ambit of criminal activity.

Great doubt is cast upon the bona fides of this criminal prosecution when it is realized that it is not a "pollution" case at all. Even if the petitioner were successful in its

criminal prosecution, respondent would still be in compliance with the state and federal standards relating to the discharge of industrial wastes into the Monongahela River since the discharges of which respondent was convicted are well within the standards of the state and federal governments. Therefore, this conviction would in no way affect or control or change the operation of respondent's plant and would in no way change the content of respondent's discharges into the Monongahela River.

It is respectfully submitted that the action of the Court of Appeals for the Third Circuit in findings that under the circumstances of this case no crime was committed should be affirmed. It is further respectfully submitted that due process considerations—fundamental fairness—require that the conviction of respondent cannot stand. Since the factual issues of this case are for the first time presented to your Honorable Court, it is respectfully submitted that the Rivers and Harbors Act of 1899 does not apply to the respondent's activities and for that reason respondent should stand acquitted of all criminal charges, without further proceedings in the court below.

Respectfully submitted,

HERBERT B. SACHS,
HAROLD GONDLEMAN,
BASKIN, BOREMAN, WILNER,
SACHS, GONDELMAN & CRAIG,

Attorneys for Respondents.

1018 Frick Building,
Pittsburgh, Pa, 15219,
(412) 562-8716.

EXHIBIT 4

Permit program

How does the permit program relate to EPA's water quality program?

Well, the permit program meshes right into the administration's request for amendments to the Water Quality Act. If and when enacted, the new law specifies that both water quality and effluent standards will be enforced through the mechanism of the permit program rather than the cumbersome and time-consuming conference procedure established by the 1965 act. In fact, the conference procedure is abolished in the proposed amendments.

We still have the hearing phase spelled out in the amendments. We can still use the administrative hearing procedure when it appears beneficial to get a number of industries and municipalities together in a particular river basin for the purpose of enhancing water quality. For example, we try to ensure that all of them are on abatement schedules and are meeting their schedules.

Isn't there overlapping federal jurisdiction on enforcement already under the Refuse Act and the Federal Water Pollution Control Act?

The laws almost contradict one another. Under the 1899 Refuse Act, it is against the law to dump refuse into the navigable waters or their tributaries without a permit. The Federal Water Pollution Control Act specifies the setting of standards by the states and approval by the federal government. Under the 1965 act, the people are to comply with the water quality standards, it says nothing about discharge into a stream being illegal.

It really isn't entirely fair to say that the reason a person is being sued under the Refuse Act is because they don't have a permit. They couldn't get one if they wanted to. Until the permit program of the Corps of Engineers was announced late last year, we didn't have any permit program for the discharge of waste into a stream.

EPA has restricted its use of the 1899 act to cases where somebody was not in compliance with water quality standards and was not doing anything to achieve compliance with those standards. There are enough of those cases to keep us busy for some time.

EXHIBIT 5

EXECUTIVE ORDERS

No. 11573

December 22, 1970, 35 F.R. 19323

EXCUSING FEDERAL EMPLOYEES FROM DUTY FOR ONE-HALF DAY ON DECEMBER 24, 1970

By virtue of the authority vested in me as President of the United States, it is hereby ordered as follows:

Section 1. Employees of the several executive departments, independent establishments, and other governmental agencies, including the General Accounting Office and the Government Printing Office, and their field services (except those employees of the Department of State, the Department of Defense, or other agencies who in the judgment of their agency heads should be at their posts of duty for national security or other public reasons, and those employees whose absence from duty would be inconsistent with the provisions of existing law) shall be excused from duty for one-half day on Thursday, December 24, 1970, the day preceding Christmas Day. Such one-half day shall be considered a holiday within the meaning of Executive Order No. 10358 of June 9, 1952,[87] as amended, and of all statutes so far as they relate to the compensation and leave of employees of the United States.

Sec. 2. The heads of departments, agencies, and independent establishments shall, to the extent consistent with the needs of the service, adopt a liberal policy for the granting of annual leave to all employees who wish to take such leave over the holiday period.

RICHARD NIXON.

THE WHITE HOUSE,
December 21, 1970.

No. 11574

December 25, 1970, 35 F.R. 19627

ADMINISTRATION OF REFUSE ACT PERMIT PROGRAM

By virtue of the authority vested in me as President of the United States, and in furtherance of the purposes and policies of section 13 of the Act of March 3, 1899, c. 425, 30 Stat. 1152 (33 U.S.C. 407),[88] the Federal Water Pollution Control Act, as amended (33 U.S.C. 1151 et seq.),[89] the Fish and Wildlife Coordination Act, as amended (16 U.S.C. 661–666c),[90] and the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4347),[91] it is hereby ordered as follows:

Section 1. Refuse Act permit program. The executive branch of the Federal Government shall implement a permit program under the aforesaid section 13 of the Act of March 3, 1899 (hereinafter referred to as "the Act") to regulate the discharge of pollutants and other refuse matter into the navigable waters of the United States or their tributaries and the placing of such matter upon their banks.

Sec. 2. Responsibilities of Federal agencies. (a) (1) The Secretary shall, after consultation with the Administrator respecting water quality matters, issue and amend, as appropriate, regulations, procedures, and instructions for receiving, processing, and evaluating applications for permits pursuant to the authority of the Act.

(2) The Secretary shall be responsible for granting, denying, conditioning, revoking, or suspending Refuse Act permits. In so doing:

(A) He shall accept findings, determinations, and interpretations which the Administrator shall make respecting applicable water quality stand-

87. 5 U.S.C.A. § 6103 note.
88. 33 U.S.C.A. § 407.
89. 33 U.S.C.A. § 1151.
90. 16 U.S.C.A. § 661 to 666c.
91. 42 U.S.C.A. § 4321 to 4347.

ards and compliance with those standards in particular circumstances, including findings, determinations, and interpretations arising from the Administrator's review of State or interstate agency water quality certifications under section 21(b) of the Federal Water Pollution Control Act (84 Stat. 108). A permit shall be denied where the certification prescribed by section 21(b) of the Federal Water Pollution Control Act has been denied, or where issuance would be inconsistent with any finding, determination, or interpretation of the Administrator pertaining to applicable water quality standards and considerations.

(B) In addition, he shall consider factors, other than water quality, which are prescribed by or may be lawfully considered under the Act or other pertinent laws.

(3) The Secretary shall consult with the Secretary of the Interior, with the Secretary of Commerce, with the Administrator, and with the head of the agency exercising administration over the wildlife resources of any affected State, regarding effects on fish and wildlife which are not reflected in water quality considerations, where the discharge for which a permit is sought impounds, diverts, deepens the channel, or otherwise controls or similarly modifies the stream or body of water into which the discharge is made.

(4) Where appropriate for a particular permit application, the Secretary shall perform such consultations respecting environmental amenities and values, other than those specifically referred to in paragraphs (2) and (3) above, as may be required by the National Environmental Policy Act of 1969.

(b) The Attorney General shall conduct the legal proceedings necessary to enforce the Act and permits issued pursuant to it.

Sec. 2. Coordination by Council on Environmental Quality. (a) The Council on Environmental Quality shall coordinate the regulations, policies, and procedures of Federal agencies with respect to the Refuse Act permit program.

(b) The Council on Environmental Quality, after consultation with the Secretary, the Administrator, the Secretary of the Interior, the Secretary of Commerce, the Secretary of Agriculture, and the Attorney General, shall from time to time or as directed by the President advise the President respecting the implementation of the Refuse Act permit program, including recommendations regarding any measures which should be taken to improve its administration.

Sec. 4. Definitions. As used in this order, the word "Secretary" means the Secretary of the Army, and the word "Administrator" means the Administrator of the Environmental Protection Agency.

RICHARD NIXON.

THE WHITE HOUSE,
December 23, 1970.

No. 11575

January 5, 1971, 36 F.R. 37

PROVIDING FOR THE ADMINISTRATION OF THE DISASTER RELIEF ACT OF 1970

By virtue of the authority vested in me by the Disaster Relief Act of 1970,[82] hereinafter referred to as the Act, and section 301 of title 3 of the United States Code,[83] and as President of the United States, it is hereby ordered as follows:

Section 1. (a) The authorities vested in the President by section 102(1) of the Act to declare a major disaster, by section 251 of the Act to

[82] 1970 U.S.Code Cong. & Adm.News, p. 2628. [83] 3 U.S.C.A. § 301.

EXHIBIT 6

COMMONWEALTH OF PENNSYLVANIA

DEPARTMENT OF HEALTH

SANITARY WATER BOARD

HARRISBURG

INDUSTRIAL WASTES PERMIT
#1803

The Sanitary Water Board, which by virtue of the Act of April 9, 1929, P.L. 177, known as The Administrative Code of 1929, and the amendments thereto, and of the Act of June 22, 1937, P.L. 1987, as amended by the Act of May 8, 1945, P.L. 455, is empowered to exercise certain powers and perform certain duties "To preserve and improve the purity of the waters of the Commonwealth for the protection of public health, animal and aquatic life, and for industrial consumption, and recreation;****", hereby issues this permit to Pennsylvania Industrial Chemical Corporation, Clairton, Pennsylvania, its successors or assigns, approving, subject to certain conditions, the purpose works for the treatment of wastes from the permittee's petro-chemicals plant located in Jefferson Borough with discharge of the treated effluent therefrom into Monongahela River, tributary to Ohio River — as requested in an application dated May 18, 1956 and attested May 24, 1956 as described in an engineering report entitled "Report on Jefferson Plant Contaminated Water Effluent Treatment System", prepared by R. H. Neubert, a professional engineer registered in Pennsylvania; and as shown on 5 drawings bearing the general title "Pennsylvania Industrial Chemical Corporation, 120 State St., Clairton, Pa.", and the following subtitles:

And this permit is further subject to the following numbered Standard Conditions of "STANDARD CONDITIONS RELATING TO INDUSTRIAL WASTES" effective January 1, 1941 attached hereto: Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 17.

This permit is issued in response to an application (No 12191-IW) filed in the Harrisburg office of the Pennsylvania Department of Health on the 27th day of June , A.D. 19 56, and in accordance with the authorization given by the Sanitary Water Board at its meeting on July 25 and 26, 1956.

SANITARY WATER BOARD

By: _____

Bureau P. Mattison, M.D.
Secretary of Health
Chairman

Attest: John W. Gittins

John W. Gittins
Secretary

Harrisburg, Pennsylvania

OCT 1 1956

FOURTEEN: If at any time the industrial waste treatment works of the permittee, or any part thereof, or the discharge of the effluent therefrom, shall have created a public nuisance, or such discharge is or may become inimical and injurious to the public health or to animal or aquatic life or to the use of the receiving body of water for domestic or industrial consumption, or for recreation, the permittee shall forthwith adopt such remedial measures as the Sanitary Water Board may advise or approve.

FIFTEEN: The improvements being effected in the waters of the Commonwealth through the progressive, sanitary clean-up of streams by the Sanitary Water Board render the effects of industrial wastes upon these waters increasingly harmful or inimical to the public interest, in consequence of which the time should be anticipated when such industrial wastes must be suitably modified prior to their discharge thereto.

Therefore, the permittee is hereby notified that when the Sanitary Water Board shall have determined that the public interests require the treatment or further treatment of the industrial wastes of the permittee, then the permittee shall, upon notice by the Board, within the time specified, submit to the Board for its approval, plans and a report providing for the degree of treatment of the permittee's industrial wastes specified by the Board and after approval thereof shall construct such works in accordance with the directions of the Board.

SIXTEEN: The permittee shall secure any necessary permission from the proper federal authority for any outfall or industrial waste treatment structure which discharges into or enters navigable waters and shall obtain from the State Water and Power Resources Board approval of any stream crossing, encroachment, or change of natural stream conditions coming within the jurisdiction of the said Board.

SEVENTEEN: Nothing herein contained shall be construed to be an intent on the part of the Sanitary Water Board to approve any act made or to be made by the permittee inconsistent with the permittee's lawful powers or with existing laws of the Commonwealth regulating industrial wastes and the practice of professional engineering, or shall be construed as approval of the structural adequacy of the approved structures; nor shall this permit be construed to permit any act otherwise forbidden by any of the laws of the Commonwealth of Pennsylvania or of the United States.

John J. Shaw M.D

John J. Shaw, M. D.
Secretary of Health
Chairman, Sanitary Water Board

EXHIBIT 7

Form No. 93a
War Department Standard
Revised December 1939

INFORMATION CIRCULAR

APPLICATIONS FOR AUTHORITY TO EXECUTE WORK OR ERECT STRUCTURES IN THE NAVIGABLE WATERS OF THE UNITED STATES

1939

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON 1939

EXHIBIT 8

PERMITS FOR WORK IN NAVIGABLE WATERS

CORPS OF ENGINEERS
DEPARTMENT OF THE ARMY
1968

INTRODUCTION

The purpose of this pamphlet is to help you in applying for authority to perform work or place structures in or across navigable waters of the United States.

Federal laws prohibit such work unless recommended by the Chief of Engineers and authorized by the Secretary of the Army before the work is begun. The authorization is ordinarily granted in the form of a permit. The permit does not give any property rights either in real estate or material, or any exclusive privileges; it does not authorize any injury to private property or invasion of private rights, nor does it obviate the necessity of obtaining State assent to the work authorized.

The pamphlet describes briefly the organization of the Corps of Engineers, its jurisdiction, and your responsibility under the Federal laws, and the method of compliance with those laws.

CONTENTS

EXHIBIT 9

Permits

for Work and Structures in, and for Discharges or Deposits into Navigable Waters

1971

PRELIMINARY EDITION

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS

EXHIBIT 10

NEWS RELEASE

U.S. Army Engineer District, Pittsburgh

FOR RELEASE ON FRIDAY, 7 MAY 1971 71-31

Implementation of Refuse Act

Pittsburgh, Pa. - 7 May 1971 - Colonel E. C. West, Pittsburgh District Engineer, announced today that he has issued approximately 2,000 letters of advice implementing the 1899 Refuse Act.

The letters are directed to about 2,000 industrial and commercial concerns presently discharging industrial wastes or effluent into navigable waters or their tributaries in the Pittsburgh Engineer District.

These waters are the Allegheny River for its full length, the Monongahela River for its full length, the Ohio River from Pittsburgh, Pa. to New Martinsville, W. Va., and all tributaries to these rivers. Tributaries include all non-navigable rivers, creeks, runs and forks, however small, whose waters ultimately flow into the three navigable rivers named.

Colonel West stated that his letter forwarded application forms (ENG Forms 4345 and 4345-1) and an information and instruction pamphlet, advising addressees that applications must be filed no later than 1 July 1971.

West emphasized that any individual, industry, or Federal, State, or other entity presently discharging industrial waste or effluent into the waters described, even though not receiving a letter of advice, will still be responsible for filing an application by 1 July 1971.

Such individuals or entities not receiving letters of advice should write for application forms and instruction pamphlets to:

District Engineer
U. S. Army Engineer District, Pittsburgh
ATTN: ORPOP-S
1000 Liberty Avenue
Pittsburgh, Pennsylvania 15222

END

20a

EXHIBIT 11 Sent 25 or more TV with 4 TV stations

DEPARTMENT OF THE ARMY
PITTSBURGH DISTRICT, CORPS OF ENGINEERS
FEDERAL BUILDING, 1000 LIBERTY AVENUE
PITTSBURGH, PENNSYLVANIA 15222

ORPPA 16 June 1971

Gentlemen:

May we have your station's assistance in helping clean up our environment?

President Nixon has directed all industries who are depositing any liquid or solid material into navigable waterways to obtain a federal permit from the U. S. Army Corps of Engineers. It is required that applications be made by these industries by July 1, 1971.

In an effort to reach as many industries as possible we would appreciate your station's using the inclosed PUBLIC SERVICE ANNOUNCEMENTS at frequent intervals during the next two weeks.

We appreciate your cooperation in this important matter.

Sincerely,

E C West

1 Incl
As stated

E. C. WEST
Colonel, Corps of Engineers
District Engineer

20-second spots for radio stations - Public Service Announcements

ATTENTION ALL BUSINESSMEN. A NEW FEDERAL REGULATION GOES INTO EFFECT JULY 1 WHICH REQUIRES ALL INDUSTRIES DUMPING WASTE MATERIAL INTO NAVIGABLE WATERS TO OBTAIN A PERMIT FROM THE U. S. ARMY CORPS OF ENGINEERS. IF YOUR INDUSTRY IS AFFECTED YOU SHOULD CONTACT THE CORPS OF ENGINEERS OFFICE IN PITTSBURGH IMMEDIATELY FOR DETAILS. PHONE: 412-644-6874.

WATER QUALITY IS EVERYBODY'S BUSINESS. UNDER A NEW FEDERAL REQUIREMENT INDUSTRIES DUMPING INTO WATERWAYS MUST APPLY FOR A FEDERAL PERMIT FROM THE U. S. ARMY CORPS OF ENGINEERS BEFORE JULY 1. APPLICATION FORMS MAY BE OBTAINED FROM ARMY ENGINEER OFFICES IN THE FEDERAL BUILDING IN PITTSBURGH. BE A GOOD CITIZEN AND MAKE YOUR CONTRIBUTION TO PROTECTION OF WATER QUALITY NOW. PHONE: 412-644-6874.

MR. BUSINESSMAN, WHAT IS YOUR GRADE AS A GOOD CITIZEN? ARE YOU CONTRIBUTING TO WATER POLLUTION? A NEW FEDERAL REGULATION REQUIRES THAT ANY INDUSTRY DUMPING ANY TYPE MATERIAL INTO A WATERWAY MUST APPLY FOR A FEDERAL PERMIT FROM THE U. S. ARMY CORPS OF ENGINEERS BY JULY 1. DO YOUR PART AND APPLY NOW FOR A FEDERAL PERMIT. CONTACT THE CORPS OF ENGINEERS IN PITTSBURGH. PHONE: 412-644-6874.

STAMP OUT WATER POLLUTION. THIS IS THE AIM OF A NEW FEDERAL PROGRAM UNDER WHICH ANY INDUSTRY DISCHARGING ANYTHING INTO A WATERWAY IS REQUIRED TO APPLY FOR A FEDERAL PERMIT FROM THE ARMY CORPS OF ENGINEERS BY JULY 1. DO YOUR PART TO HELP STAMP OUT WATER POLLUTION. IF YOUR INSTALLATION INVOLVES EFFLUENT DISCHARGES, CONTACT THE CORPS OF ENGINEERS IN PITTSBURGH. PHONE: 412-644-6874.

CLEAN, CLEAR WATER IS VALUED TODAY MORE THAN EVER BEFORE. IN AN EFFORT TO HELP ELIMINATE WATER POLLUTION, A NEW FEDERAL REGULATION REQUIRES INDUSTRIES TO OBTAIN AN ARMY ENGINEERS PERMIT FOR ANY MATERIAL DEPOSITED IN NAVIGABLE WATERWAYS. LET'S ALL COOPERATE IN RAISING THE STANDARDS OF OUR VALUABLE NATURAL WATERWAYS. CONTACT THE CORPS OF ENGINEERS IN PITTSBURGH. PHONE: 412-644-6874.

AN INTENSIVE CAMPAIGN TO CLEAN UP THE NATION'S RIVERS AND STREAMS HAS BEEN LAUNCHED BY THE FEDERAL GOVERNMENT. A NEW REGULATION REQUIRES THAT INDUSTRIES DEPOSITING ANYTHING INTO A RIVER OR STREAM OBTAIN A PERMIT FROM THE U. S. ARMY CORPS OF ENGINEERS. APPLICATIONS MUST BE MADE BY JULY 1, 1971. STRICT MONITORING OF WATER QUALITY WILL BE ENFORCED. AFFECTED INDUSTRIES SHOULD CONTACT THE ARMY CORPS OF ENGINEERS OFFICE IN PITTSBURGH NOW. PHONE: 412-644-6874.